

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

EL PASO DISPOSAL, L.P.¹

Employer

and

Case 28-RC-6373

**INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 351, AFL-CIO**

Petitioner

DECISION AND DIRECTION OF ELECTION

International Union of Operating Engineers, Local 351, AFL-CIO (Petitioner), seeks an election in a unit comprised of all front-load drivers, residential drivers, relief drivers, roll-off drivers, buggy drivers, storage unit drivers, Poly Cart drivers, and bulk drivers employed by El Paso Disposal, L.P. (Employer) in El Paso, Texas. The Petitioner's proposed unit would include between 51 and 55 employees. Contrary to the Petitioner, the Employer contends that the only appropriate unit consists of the above-described drivers, together with all fleet maintenance employees, container maintenance employees, and compactor maintenance employees. The Employer's proposed unit would include 88 employees. Based on the reasons set forth more fully below, I find that the unit sought by the Petitioner and limited to drivers is appropriate, because they share a sufficiently distinct community of interest to warrant placement in a separate unit from the maintenance employees.

DECISION

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. **Hearing and Procedures:** The Hearing Officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. **Jurisdiction:** The parties stipulated that the Employer, El Paso Disposal, L.P., a limited partnership with a place of business in El Paso, Texas, is engaged in the business of providing waste disposal services. During the 12-month period preceding the hearing in this matter, the Employer purchased and received at its El Paso, Texas place of business goods and materials valued in excess of \$50,000 directly from sources outside the State of Texas. The Employer is engaged in commerce within the meaning of the Act, and, therefore, the Board's asserting jurisdiction in this matter will accomplish the purposes of the Act.

¹ The name of the Employer appears as corrected at the hearing.

3. **Claim of Representation:** The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. **Statutory Question:** A question affecting commerce exists concerning the representation of certain employees within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. **Unit Finding:** The issue presented in this case is whether a unit comprised of all front-load drivers, residential drivers, relief drivers, roll-off drivers, buggy drivers, storage unit drivers, Poly Cart drivers, and bulk drivers (collectively, drivers) is an appropriate unit, or whether the only appropriate unit must also include fleet maintenance employees, container maintenance employees, and compactor maintenance employees.² To provide a context for my discussion of these issues, I will present the record facts regarding the Employer's organizational and supervisory structure, physical plant and operating procedures, employees' conditions of employment, and the interchange and transfers among employees. At the outset, I note that there is no evidence of any collective-bargaining history.

A. The Employer's Organizational and Supervisory Structure

The Employer is engaged in the business of collecting and disposing solid waste for commercial, industrial, and residential customers in the El Paso County, Texas and Dona Ana County, New Mexico areas. The Employer operates out of two locations, 5539 El Paso Drive and 5355 El Paso Drive, El Paso, Texas. These locations are less than a block apart.

The Employer's highest-ranking official is District Manager George Wayne, who also holds the title of Divisional Vice President of the Southwestern Division for the Employer's parent company, Waste Connections. As the District Manager, Wayne is responsible for all aspects of the Employer's operations, including accounting, sales, customer relations, and operations. Wayne's office is located at the Employer's 5539 El Paso Drive location.

The business of collecting and disposing of solid waste is handled by the Employer's operations department. The manager of that department is Armando Lopez, who reports directly to Wayne. The operations department is subdivided into eight other departments: roll off, front load, residential, dispatch, container maintenance, compactor maintenance, fleet maintenance, and safety. The roll off, front load, and residential departments are supervised by the operations supervisor, Fred Minjares. The container maintenance department is supervised by the container maintenance supervisor, Eloy Gardea. The compactor maintenance department is supervised by the compactor maintenance supervisor, David Galvan. The fleet maintenance department is supervised by the fleet maintenance manager, Danny Padilla, and two shift supervisors, Victor Mariscal and Benito Beanes. The safety

² In its original petition, Petitioner sought a unit consisting of all front load drivers, side load (residential) drivers, relief drivers (incorrectly referenced as "release" drivers), and roll off drivers (incorrectly referenced as "roll up" drivers). During the hearing, Petitioner amended its petition to include buggy drivers, storage unit drivers, Poly Cart drivers, and bulk drivers.

department consists of only one employee, who is regarded as a manager. The record does not discuss the composition of the dispatch department. The parties stipulated, the record shows, and I find that Wayne, Minjares, Gardea, Galvan, Padilla, Mariscal, and Beanes are supervisors of the Employer within the meaning of Section 2(11) of the Act and should be excluded from any unit found appropriate.

The Employer employs between 51 and 55 drivers at its El Paso facilities. These drivers are divided into the following categories:

1. **Roll off drivers.** Roll off drivers operate a truck that is designed to carry a large open top or hydraulic compaction container to a customer's site and remove that container when it becomes full or the customer ceases paying for service. The Employer operates between 13 and 24 roll off routes in any given day. Roll off drivers are assigned to the roll off department and work out of the 5355 El Paso Drive location.
2. **Front load drivers.** Front load drivers operate a truck that is designed to lift and empty large dumpsters, ranging in size from two to eight yards, typically used by commercial and industrial customers. These trucks have a hydraulic compactor that compacts solid waste in the truck's storage bin. The Employer operates between 22 and 24 front load routes in any given day. Unlike roll off routes, front load pickups occur on a regularly scheduled basis, from one to five times a week. Front load drivers are assigned to the front load department and work out of the 5355 El Paso Drive location.
3. **Residential drivers.** Residential drivers operate a side-loading truck that is designed to lift and empty rolling trash cans used by residential customers. These trash cans range in size from 30 to 96 gallons, and are constructed from plastic polyethylene. The Employer operates five residential routes on any given day. Residential routes, like front load routes, occur on a regularly-scheduled basis. Residential drivers are assigned to the residential department and work out of the 5355 El Paso Drive location.
4. **Poly Cart driver.** The lone Poly Cart driver's primary job function is to deliver and pick up residential trash cans when there is a start in service, stop in service, or the trash can needs replacing. The Poly Cart driver is assigned to the container maintenance department and works out of the 5539 El Paso Drive location.
5. **Buggy drivers.** Buggy drivers deliver and pick up the front load dumpsters when there is a start in service, stop in service, or the front load dumpster needs to be replaced. Buggy drivers are also assigned to the container maintenance department and works out of the 5539 El Paso Drive location.
6. **Bulk drivers.** Bulk drivers operate a roll off truck modified with a specialized arm that can pick up bulk trash at residential addresses. Bulk drivers are also assigned to the container maintenance department and work out of the 5539 El Paso Drive location.

7. **Storage unit driver.** The lone storage unit driver delivers storage containers to customers' sites. These storage containers range in size from 20 to 40 feet, and are not involved in the collection or disposal of waste. The record is unclear what department this driver is assigned to, but indicates he works out of the 5539 El Paso Drive location.

As noted above, the container maintenance department includes Poly Cart, buggy, and bulk drivers. There are a total of five such drivers. In addition, the container maintenance department includes 14 other employees. These employees are responsible for cleaning out the various types of containers provided by the Employer, painting the containers, welding any breaks, and otherwise ensuring that they are ready and available for service. This work is performed at the Employer's facility at 5539 El Paso Drive.

The employees in the compactor maintenance department are responsible for installing, maintaining, and repairing the hydraulic compactors delivered to customers by roll off drivers. This work is usually performed at the customer's site.

The employees in the fleet maintenance department are responsible for performing scheduled maintenance and emergency repairs on the Employer's vehicles. The fleet maintenance department works out of the Employer's facility at 5355 El Paso Drive. Most of the fleet maintenance work is performed at the Employer's facility, but, when necessary, a fleet maintenance employee will perform roadside repairs including, for example, fixing a flat tire or repairing a broken hydraulic line. Seven fleet mechanics possess certified drivers' licenses (CDLs) and, thus, can operate the Employer's trucks. They do so only for purposes of bringing a replacement truck to a driver whose truck has broken down on the road. There are two shifts of fleet mechanics, a day shift and a night shift.

B. Employees' Terms and Conditions of Employment

The primary duty of the various drivers is to operate a vehicle. Roll off, front load, bulk, and residential drivers use their vehicles to pick up solid waste and transport it to a landfill. Poly Cart, buggy, storage unit, and, to some extent, roll off drivers, pick up and drop off containers. To hold these positions, drivers must possess CDLs. If an employee for any reason loses his CDL, the Employer will remove that person from his driver position.

Roll off, front load, and residential drivers begin their shifts at different times. One reason for this is that local ordinances restrict the Employer's ability to operate its vehicles in residential and other areas during the early morning hours. Typically, however, front load drivers, who work in mostly commercial and industrial areas, begin work between 2:00 and 4:00 a.m. Roll off drivers typically begin work between 4:00 and 7:30 a.m., depending on the amount of work available. Residential drivers typically do not start work before 6:30 a.m. The record does not indicate when the other drivers begin work. The start times for roll off, front load, and residential drivers are different from the start times of maintenance employees.

The drivers' daily routines are similar. After clocking in, they pick up a route sheet that is left for them by the dispatcher, along with a Vehicle Condition Report (VCR) book. The route sheet tells them what stops they have for that day. The drivers then go to their vehicle and perform a pre-trip inspection, checking off categories on the VCR. This

inspection takes about 15-30 minutes. Drivers perform this inspection alone, without any assistance from fleet maintenance or other employees. Once the inspection is complete, the drivers leave the facility. Drivers eat lunch and take breaks on their routes, and do not return to the facility during the day.

Roll off, front load, and residential drivers will take their vehicles to a landfill located in New Mexico several times a day. Bulk, Poly Cart, and buggy drivers also travel to the landfill, although on a less frequent basis. Storage unit drivers may also visit the landfill. This is because the Employer does not have space to park storage units at its facility, and must use the landfill to store these units. As a general rule, the drivers' separate routes keep them from having much interaction with each other during the work day. Buggy and bulk drivers sometimes interact with other drivers to the extent that they transfer their loads for transport to the landfill.

After the drivers complete their routes, they return to the facility. Upon returning, they fill out paperwork that reflects, among other things, the number of miles they drove, the number of stops, and yardage of waste picked up. This paperwork is left at the administrative office. Drivers then fuel their vehicles. While fueling their vehicles, the drivers perform a post-trip inspection, again using the VCR. Drivers then give the VCR to one of the maintenance supervisors, and inform the supervisor of any problems with the vehicle. The maintenance supervisor will then assign that work to a mechanic. There is no direct contact between drivers and maintenance employees in this process.

In total, drivers spend no more than one hour a day – 20 to 30 minutes in the morning and 20-30 minutes in the evening – at the Employer's facilities.

If a driver's vehicle breaks down on the road, the driver will contact the dispatcher, who will send a mechanic to repair the vehicle. Except for describing the problem to the mechanic, there is no interaction between the mechanic and the driver during these roadside repairs. Similarly, if a driver notes a problem with a container, he contacts the dispatcher, who will send out a container or compactor maintenance employee to fix the problem. Drivers do not have any direct contact with container or compactor maintenance employees.

All employees in the operations department are required to attend monthly safety training meetings. Roll off, front load, and residential drivers do not typically attend these meetings with employees from the container maintenance, compactor maintenance, or fleet maintenance departments.

Most of the roll off and residential drivers are paid on a piecework basis, based on the number of loads or lifts, plus a safety bonus. All other drivers, as well as the container maintenance, compactor maintenance, and fleet maintenance employees, are paid an hourly rate basis. The record is silent as to the relative wage rates of these positions. All employees receive the same benefits package.

C. Interchange and Transfers

The record establishes that, since February 2002, five drivers have transferred from one driving position to another. This includes the June 2004 transfer of a driver assigned to the container maintenance department to a roll off position. In addition, two drivers have

transferred to non-driving positions for periods of about six months, apparently because they temporarily lost their CDL. Another driver, for reasons not disclosed in the record, transferred from a residential driver position to a truck washer position in August 2003. Finally, the record reflects that, in February 2002, the Employer granted a roll off driver's request to transfer to a mechanic position and, in October 2002, a container maintenance employee transferred into a buggy driver position. There is no record evidence of any permanent transfers between driver and non-driver positions after August 2003.

The record also establishes that, with the exception of the two drivers who lost their CDLs, there have been no temporary transfers.

D. Legal Analysis and Determination

It is well settled Board law that a union need not seek to represent only the most appropriate unit or most comprehensive unit, but only an appropriate unit. *Transerv Systems*, 311 NLRB 766 (1993); *Morand Bros. Beverages Co.*, 91 NLRB 409 (1950). As explained in *Weldun International*, 321 NLRB 733, 751 (1996):

The issue is whether the unit sought by the Union is appropriate, not whether Respondent's proposed unit or any other unit is more appropriate or even the most appropriate. See *Morand Brothers Beverage Co.*, 91 NLRB 409 (1950), *enfd.* 190 F.2d 576 (7th Cir. 1951). See also *Gateway Equipment Co.*, 303 NLRB 340 (1991).

In determining unit scope, the Board first considers the petitioning union's proposals. If the unit sought is an appropriate unit, the inquiry ends. If it is inappropriate, the Board will scrutinize the employer's proposals. *Dezcon, Inc.*, 295 NLRB 109, 111 (1989). In deciding whether a unit is appropriate, the Board examines various factors, including differences or similarities in the method of wages or compensation, hours of work, employment benefits, supervision, working conditions, job duties, qualifications, training, and skills. The Board also considers the degree of integration between the functions of employees, contact with other employees, interchange with other employees, and history of bargaining. *Overnite Transportation Co.*, 322 NLRB 723, 724, citing *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962). The petitioner's desire as to the unit is a relevant consideration, but not dispositive. *Florida Casino Cruises*, 322 NLRB 857, 858 (1997), citing *Airco, Inc.*, 273 NLRB 348 (1984).

Based on the record before me, I find that a unit limited to all drivers employed by the Employer in El Paso, Texas, constitutes an appropriate unit. In reaching this conclusion, I rely on several factors. Initially, I note that the evidence as a whole indicates that drivers and maintenance employees have very defined and distinct work duties and tasks, and there is very little routine interchange in their work assignments. In this regard, there is no evidence of any regular daily transfer of employees between the driver and maintenance functions. While the record discloses some permanent transfers, it appears that they are achieved through an employee's voluntary application and are few and far between.

Other factors upon which I rely include that drivers are required, as a condition of employment, to possess a CDL, while other employees are not; drivers spend the majority of their working time on the road, thus having little or no contact with other employees; drivers'

work times differ from other employees; they are given route assignments by the dispatcher; they spend relatively little time at the employer's facility; and they complete paperwork required of no other employee. These factors are common to all drivers, including buggy, Poly Cart, and bulk drivers, who are assigned in the container maintenance department, and storage unit drivers. In light of these factors and the Petitioner's desire to represent its petitioned-for unit, as amended, and notwithstanding the similar benefits enjoyed by the employees in all classifications, I find that the petitioned-for unit of drivers is appropriate.

This result is supported by recent cases in which the Board and the courts have approved petitioned-for units of drivers notwithstanding an employer's assertion that the unit must include mechanics. In *Overnite Transportation Company*, 322 NLRB 347 (1996), affirmed 322 NLRB 723 (1996) (denial of the employer's motion for reconsideration), the Board found such a unit appropriate where the regular supervision of the two groups was separate, the mechanics had specialized skills, and there was no regular interchange, notwithstanding the fact that one classification acted as an extra set of hands to assist the other classification at times.

A similar result obtained in a subsequent case involving the same employer in *Overnite Transportation Company*, 325 NLRB 612 (1998). There the Board excluded mechanics from a petitioned-for unit of drivers and various other employees, where the mechanics were separately supervised and worked in a separate shop area. The Board found that, even though the mechanics did not have any special certification, they required special skills in order to repair the employer's vehicles. The Board found the type of contact and integration between drivers and mechanics when mechanics perform inspections, when drivers report vehicle concerns to mechanics, and when breakdowns occur on the road to be insufficient to require inclusion of the mechanics. The Board noted that the mechanics' possession of a CDL was optional, that only 4 out of the 14 mechanics had a CDL, and that only 1 of the 14 mechanics performed driving duties that might be similar to those of the drivers in the unit. The Board found that driving duties performed by the mechanics in connection with the emergency repair of vehicles was not the type of driving performed by drivers in the unit and was insufficient to require their inclusion.

Similarly, in *Laidlaw Waste Systems v. NLRB*, 934 F.2d 898 (7th Cir. 1991), the Seventh Circuit concluded that the Board had properly found a unit of truck drivers, excluding mechanics, appropriate where they served different functions at different pay scales and reported to different supervisors. See also *Mc-Mor-Han Trucking, Inc.*, 166 NLRB 700; *Diamond Standard Fuels Corp.*, 179 NLRB 702 (1969).

More recently, in *Home Depot, USA*, 331 NLRB 1289 (2000), the union sought a unit of full-time and regular part-time drivers, excluding warehouse employees. In dismissing the petition, the Regional Director found that the drivers were not functionally distinct from warehouse employees because the two groups had overlapping job functions, worked out of the same department, had the same supervisor, and experienced significant interchange. The Board reversed. It first noted that truck drivers often have a "dual community of interest," with certain factors supporting their inclusion in the same unit as other plant employees, and certain factors favoring their representation in a separate unit. *Id.* at 1290, citing *Pacemaker Mobile Homes*, 194 NLRB 742, 743 (1971). The Board then acknowledged that the drivers had much in common with the warehouse employees, but held that these common factors were overshadowed by the fact that drivers were required to have special driving

qualifications and licensing, had limited contact with other employees, and spent most of their time on the road. As for the overlapping job functions, the Board held that they were “incidental to [the drivers’] primary job function of operating the delivery trucks, preparing for deliveries and making deliveries.” *Id.* at 1291.

This case is readily distinguishable from *Levitz Furniture Co. of Santa Clara, Inc.*, 192 NLRB 61 (1971), in which the Board found that a proposed unit of truck drivers did not constitute a functionally distinct group with special interests sufficient to warrant their separate representation. In *Levitz*, the truck drivers were not required to have any special licenses; other employees performed work regularly performed by truck drivers and used the drivers’ trucks; truck drivers often performed the same work as other employees; and truck drivers were temporarily assigned to perform sales work. Unlike the truck drivers in *Levitz*, the drivers here do not spend a substantial portion of their time working alongside or in close proximity with other employees. Similarly, other employees here are not involved substantially with driving, and none with the hauling of waste or other items to the landfill. Finally, the drivers here, unlike those in *Levitz*, are specially licensed.

This case is also readily distinguishable from *Indiana Refrigerator Lines, Inc.*, 157 NLRB 539 (1966), upon which the Employer relies. In that case, the petitioning union sought a unit consisting of drivers and mechanics. Noting that the maintenance employees were an essential part of the employer’s total operation,” the Board found the requested unit appropriate. Unlike the petitioner in *Indiana Refrigerator Lines*, however, the Petitioner in this case does not seek to represent mechanics. This factor was determinative in *Indiana Refrigerator Lines*, where the Board acknowledged that “the drivers and the maintenance employees might also separately constitute appropriate units.” *Id.* at 551. The other cases cited by the Employer in its post-hearing brief are likewise inapposite. See *Calco Plating, Inc.*, 242 NLRB 1364 (1979) (truck drivers spent substantial time at employer’s plant working with production employees and performing production work, and production employees performed driver work on a regular basis); *NLRB v. Great Western Produce, Inc.*, 839 F.2d 555 (9th Cir. 1988) (affirming Board’s determination that unit consisting of drivers and mechanics was appropriate; unit found appropriate was unit sought by petitioner).

Accordingly, based upon the foregoing and the stipulations of the parties at the hearing, I find that the following employees of the Employer constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All front load drivers, residential drivers, relief drivers, roll off drivers, buggy drivers, storage unit drivers, Poly Cart drivers, and bulk drivers employed by the Employer in El Paso, Texas, but excluding all other employees, including compactor maintenance employees, container maintenance employees, fleet maintenance employees, dispatchers, sales employees, office clerical employees, guards, and supervisors as defined in the Act.

There are approximately 51 to 55 employees in the unit found appropriate herein.

DIRECTION OF ELECTION

I direct that an election by secret ballot be conducted in the above unit at a time and place that will be set forth in the notice of election, that will issue soon, subject to the Board's Rules and Regulations. The employees who are eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Also eligible are those in military services of the United States Government, but only if they appear in person at the polls. Employees in the unit are ineligible to vote if they have quit or been discharged for cause since the designated payroll period; if they engaged in a strike and have been discharged for cause since the strike began and have not been rehired or reinstated before the election date; and, if they have engaged in an economic strike which began more than 12 months before the election date and who have been permanently replaced. All eligible employees shall vote whether or not they desire to be represented for collective-bargaining purposes by:

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 351, AFL-CIO

LIST OF VOTERS

In order to ensure that all eligible voters have the opportunity to be informed of the issues before they vote, all parties in the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, I am directing that within seven (7) days of the date of this Decision, the Employer file with the undersigned, two (2) copies of an election eligibility list containing the full names and addresses of all eligible voters. The undersigned will make this list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, the undersigned must receive the list at the NLRB Regional Office, 2600 North Central Avenue, Suite 1800, Phoenix, Arizona, 85004-3099, on or before June 7, 2005. No extension of time to file this list shall be granted except in extraordinary circumstances. The filing of a request for review shall not excuse the requirements to furnish this list.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. The Board in Washington must receive this request by June 14, 2005. A copy of the request for review should also be served on the undersigned.

Dated at Phoenix, Arizona, this 31st day of May 2005.

/s/ Cornele A. Overstreet

Cornele A. Overstreet, Regional Director
National Labor Relations Board, Region 28